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No. 80-1779

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1980

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HOWARD ELLIS - - - - - Petitioner

vs.

LOMER ELLIS, SR.;
IRENE ELLIS, his wife; and
LOMER ELLIS, JR. - - - - Respondents

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On Writ of Certiorari to the
Court of Appeals of Kentucky

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## RESPONSE

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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*May it please the Court:*

The respondents, Lomer Ellis, Sr., et al., are hereinafter referred to as LOMER. The petitioner, Howard Ellis, is hereinafter referred to as HOWARD. Lomer requests that the petition that a writ of certiorari issue to the Court of Appeals of Kentucky be denied.

## COUNTERSTATEMENT OF THE CASE

In the trial court, the Circuit Court of McLean County, Kentucky, it was established by essentially uncontroverted evidence that Howard had seeded Lomer's farm land with wild cane seed and johnsongrass seed in an apparent strike back at Lomer, his brother, for many problems they had over the years

and lately for a ditch problem. Howard denied any knowledge or involvement in the act.

Howard was home on the night of the evil deed. His pickup had old grocery sacks in it which contained the remnants of cane seed and johnsongrass seed, and these sacks and seed were found by the State Police Detective who was investigating the incident in the early afternoon of the day following the occurrence.

An expert analysis was done on the seed found in Howard's pickup, and the testimony provided to the Court and the jury was conclusive as to the nature of the seed found.

Plaster casts of tire tracks like those of the tires on Howard's pickup were made in the fields. A small vehicle that had been used by the culprit to drive around the fields to cast the weed seed out its window became mired at the end of one field and had to be pulled out by a tandem wheeled truck. Howard's house trailer was the closest residence to the fields where the seed was found, and in fact was within vision of the location where the vehicle became mired in Lomer's field. Howard's tandem truck was in his yard, and tracks from the field pointed in the direction of Howard's yard and trailer. The State Police Detective said that Howard's pickup and tandem tires matched the tire tracks in the field, and the casts produced in the trial court showed tires like the type Howard had purchased for his pickup from the local tire dealer.

If all this be true, the Court will ask, why was not a verdict rendered for Lomer and against Howard.

The reason was that over the strong and repeated objection of Lomer's attorney, Howard's attorney was allowed to turn the trial into a circus and parade of cronies of Howard's who were allowed to testify that they believed Howard and that he was a man with a reputation for truth and veracity and for honesty and fair dealing (which was not involved in the case). The trial was turned into a popularity contest, and Lomer's attorney was neither disposed to nor prepared to respond to a parade of witnesses who provided irrelevant, immaterial and prejudicial evidence which was inadmissible under Kentucky law.

The jury was drawn off the track and away from the real issue in the case. It returned a verdict nine to three for Howard, the defendant.

The law of Kentucky was clear and was clearly seen by the Court of Appeals of Kentucky which reversed the trial court for having admitted the testimony of Howard's reputation.

Howard's attorney sought discretionary review by the Supreme Court of Kentucky, and it was denied. Now he petitions for certiorari to the United States Supreme Court.

We find Howard's argument difficult to follow. Howard argues that if a man's lawyer cannot try a case the way he wants and sway the jury with irrelevant evidence—not relevant to the issue of whether or not Howard was the perpetrator of the evil act—his client is somehow deprived of constitutional rights. We submit there is no merit in this petition for certiorari. This is borne out by the total absence of any legal au-

thority cited in the petition as precedent for Howard's argument. No authority is cited that any constitutional right of Howard has been denied.

## ARGUMENT

**Certiorari Should be Denied as This Is Not a Proper Case Under Rule 17 of the Rules of the Supreme Court of the United States. There Are No Special or Important Reasons For Review by the Supreme Court Since No Federal Question Was Decided by the Kentucky Court of Appeals.**

The issue presented to the Court of Appeals of Kentucky was a very simple one. The Court responded promptly and directly overruling the trial Court on the very simple and clear issue of the admissibility of irrelevant and prejudicial testimony of the character of the defendant for truth and veracity and honesty and fair dealing. This Court should refer to the Opinion of the Court of Appeals (Petition, App. 4, p. A-9) if this Court has any inclination to believe that there is any merit to this petition for certiorari. The Opinion of the Court of Appeals of Kentucky is clear and correct. If the United States Supreme Court were to grant certiorari, it would be raising a "federal question" which was not raised, addressed or decided in the Court below.

The whole question in this matter reverts back to the relevancy of the character evidence to the issues tried to the jury in McLean Circuit Court. The issue in the Circuit Court was not the character of Howard, but whether Howard spread weed seed on Lomer's fields.

Howard asks the Supreme Court to grant certiorari and create a constitutional issue or federal question where none exists. Certainly this is not a proper case in which the Supreme Court of the United States should exercise its discretionary authority to grant certiorari.

The Opinion of the Court of Appeals of Kentucky in this case simply follows legal precedent in Kentucky. The legal principal, which requires that a court avoid a constitutional question when it is not necessary to resolve a case, clearly comes into play in this matter and should also be considered by the Court in the exercise of its discretion. No discretionary review should be granted to consider a constitutional issue never raised in the court below and which is unnecessary to the decision of the case. This case in the Kentucky courts dealt with an evidence question and was promptly decided as an evidence question based on the authorities existing in Kentucky which bind all private citizens who seek the forum of state courts to decide their grievances rather than to take the law into their own hands.

## CONCLUSION

There being no proper case presented for the grant of certiorari, the respondent requests that the Petition for a Writ of Certiorari to the Court of Appeals of Kentucky be denied.

Respectfully submitted,

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